

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 04 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AUDEL DE JESUS SANCHEZ-
ESPINOZA,

Defendant - Appellant.

No. 05-50923

D.C. No. CR-03-03539-JSR

MEMORANDUM *

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted August 26, 2008**

Before: SCHROEDER, KLEINFELD, and IKUTA, Circuit Judges.

Audel De Jesus Sanchez-Espinoza appeals from the 57-month sentence imposed following his guilty-plea conviction for being a deported alien found in

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

the United States, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Sanchez-Espinoza contends that the district court impermissibly enhanced his sentence beyond the two-year statutory maximum based upon a prior conviction that was neither admitted by him nor found by a jury beyond a reasonable doubt, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This contention is foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir. 2006).

Sanchez-Espinoza also contends that the district court erred in failing to adequately consider the 18 U.S.C. § 3553(a) factors and by attaching a presumption of reasonableness to the Guidelines. This contention fails as the record reflects that the district court imposed the within-Guidelines range sentence after properly considering the § 3553(a) factors as well as Sanchez-Espinoza's request for a downward departure and arguments in mitigation. Furthermore, the district court expressly noted that the Guidelines were not binding. The district court did not procedurally err, and the sentence is reasonable. *See Gall v. United States*, 128 S. Ct. 586, 596-97 (2007); *see also United States v. Carty*, 520 F.3d 984, 994-95 (9th Cir. 2008) (en banc).

AFFIRMED.